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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

QUINCY SMITH, Plaintiff and Appellant, v. CITY OF OAKLAND et al. Defendants and Respondents.	A133070 (Alameda County Super. Ct. No. RG-10-522553)

Quincy Smith, employed by the City of Oakland (City), sued the City and individually named defendants, including Brook Levin and David Ferguson, alleging discrimination, harassment, and retaliation pursuant to the California Fair Employment and Housing Act (FEHA).[1] In his appeal, he challenges a trial court's ruling sustaining a demurrer without leave to amend as to all causes of action against Levin and Ferguson. We conclude the court acted within its discretion when it declined to grant Smith further leave to amend his complaint as to these defendants, and affirm.

BACKGROUND

When Smith and his coplaintiff, Bobby McConnell, filed their initial complaint in June 2010, both had been employed by the City's Public Works Agency (Agency) for some eight years, each as a Litter Enforcement Officer (LEO). Their allegations of

[1] See Gov. Code section 12900 et seq.

employment discrimination, harassment, and retaliation[2] were based on the alleged conduct of defendant Cookie Robles-Wong, who in February 2008 had been appointed supervisor of the LEO unit in which Smith and McConnell worked. Each complained about Robles-Wong's appointment, both to the City Auditor and their union representatives, believing they had been unfairly excluded from an opportunity to compete for the LEO supervisor position, and believing the appointment of Robles-Wong was improper because Robles-Wong, unlike Smith and McConnell, had no previous experience as an LEO at the time of her appointment. About two weeks after the plaintiffs submitted a complaint about the appointment to the City Auditor, Robles-Wong began a campaign of harassment against them.

Plaintiffs alleged Levin was at all relevant times the Assistant Director of the Agency, while Ferguson was its Operations Manager. The only other allegation specific to these two defendants stated that Levin, in response to their complaint about Robles-Wong's appointment, said "the decision was made and [they] needed to just deal with it."

The City filed a general demurrer to the complaint in July 2010. On November 30, 2010, the trial court sustained the demurrer as to all causes of action, with leave to amend. As to the FEHA causes of action, the court concluded plaintiffs failed to allege a "nexus" between the alleged adverse actions of Robles-Wong and "illegal conduct based upon a protected status."[3] As to Levin and Ferguson, the court determined plaintiffs failed to allege any basis for their liability.

Smith and McConnell filed their first amended complaint in December 2010. The plaintiffs expanded upon the "agency" allegation which they had directed against the individually named defendants in their original complaint. The amended "agency" allegations stated, for example, that "each defendant knew or realized that the other defendants were engaging in . . . the [alleged] violations of law [and] [k]nowing or

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[2] The original complaint also included causes of action for breach of contract and negligence, subsequently dropped.

[3] Smith alleged he was "an African-American male, age 39," while McConnell, alleged he was "a disabled Caucasian male, age 62."

realizing that other defendants were engaging in such unlawful conduct, each defendant nevertheless facilitated the commission of those unlawful acts." But the allegations against Levin and Ferguson remained unchanged.

The City filed a general demurrer to the first amended complaint at the end of December 2010. On March 24, 2011, the trial court sustained the demurrer with leave to amend. The court granted Smith and McConnell a second opportunity "to allege a nexus" that would show Robles-Wong's alleged actions against Smith and McConnell constituted unlawful discrimination, harassment, or retaliation arising from their protected status—that is, from Smith's race and McConnell's disability and age. (See fn. 3, *ante.*)

In April 2011, Smith filed a second amended complaint as a sole plaintiff. The allegations were amended to omit references to Smith's former coplaintiff, and a few new allegations stated that: (1) Smith "was more qualified" than Robles-Wong, but had been "skipped over for [the appointment] based upon his race;" (2) Robles-Wong's alleged actions against Smith arose from the "animus" she "harbored . . . toward [Smith] because [he was] an African-American male . . . who engaged in protected activities of filing complaints with his union and the City Auditor and serving on a jury"; and (3) "[r]ecently, Defendants have apprised [Smith] that he will be terminated from his employment on June 30, 2011," whereas Robles-Wong was to continue her employment. There were no other material amendments. In particular, the allegations of the second amended complaint against Levin and Ferguson remained as before.

The City, now joined by individual defendants Levin, Ferguson, and Robles-Wong, filed a general demurrer to the second amended complaint in late April 2011. As amended, this demurrer objected that the causes of action for discrimination and harassment were conclusory and failed to state causes of action under FEHA, and the cause of action for retaliation failed to allege protected conduct necessary to state a viable cause of action. Levin and Ferguson additionally objected they were not subject to Smith's claims for discrimination and retaliation, and the complaint as a whole failed to allege any actionable conduct on their part.

According to Smith, the trial court issued a tentative ruling on the general demurrer in June 2011. Smith challenged that ruling to the extent it sustained the demurrer without leave to amend as to the cause of action for harassment against Levin and Ferguson. As Smith admits in his opening brief, the court then granted him a short period to allege facts regarding acts by Levin and Ferguson that would state a cause of action against them for harassment. Smith submitted such a proffer, dated July 1, 2011, adding a few additional facts discussed below.

In an order dated August 10, 2011, the trial court, in pertinent part, sustained the demurrer without leave to amend with respect to the cause of action for harassment against Levin and Ferguson, concluding Smith had failed to allege any actionable conduct on the part of these defendants, and had not shown he could do so even if he were given leave to amend.[4]

This appeal followed.[5]

DISCUSSION

Smith essentially concedes his second amended complaint failed to state a cause of action for harassment under FEHA against either Levin or Ferguson. His sole contention

[4] The trial court also sustained the demurrer without leave to amend to the extent it related to Smith's causes of action against Levin and Ferguson for discrimination and retaliation under FEHA because an "employer is liable for retaliation under [FEHA], but non-employer individuals are not personally liable." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173.) Similarly, a "supervisory employee[is] at risk of personal liability [under FEHA] for personal conduct constituting harassment, but [not] for personnel management decisions later considered to be discriminatory." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 62 (*Janken*).) While this ruling is necessary to our assumption of appellate jurisdiction (see fn. 5, *post*), Smith does not challenge it. Nor does he challenge the remainder of the order in which the court sustained the demurrer with leave to amend as to defendants City and Robles-Wong.

[5] Appeal from an order sustaining a demurrer without leave to amend must generally await the ensuing judgment of dismissal, but when, as here, the order has sustained the demurrer as to all causes of action against the defendants who are subject to the appeal, all that is left to make the order appealable is the formality of the entry of the dismissal judgment. To avoid delay and in the furtherance of justice, we thus deem the order sustaining the demurrer as to Levin and Ferguson to incorporate a judgment of dismissal. (See *Sizemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1396.)

is the trial court abused its discretion by declining to grant leave to amend his harassment cause of action to state a viable claim against those defendants.

An abuse of discretion in sustaining a demurrer without leave to amend is established if the plaintiff shows there is a reasonable possibility the defect can be cured by amendment. (*Larwin-Southern California, Inc. v. JGB Investment Co.* (1979) 101 Cal.App.3d 626, 635 (*Larwin*).) Absent a reasonable possibility of cure by amendment, we will affirm. (*G.L. Mezetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1091–1092.)

Smith has the burden of showing abuse of discretion, by showing how the complaint can be amended and how that amendment will change the legal effect of his pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d. 335, 349.) On appeal, Smith relies on the additional allegations he submitted to the trial court in his proffer of facts. These were: (1) Levin was "responsible" for Robles-Wong appointment as LEO supervisor; (2) Smith told Levin he believed Levin "broke the rules in hiring . . . Robles-Wong[,] and [in] not permitting [Smith] to compete for the position"; (3) some two weeks after Smith's statement to Levin, Robles-Wong began her "campaign of harassment" against Smith; (4) Levin and Ferguson "never acted to correct" Robles-Wong's actions against Smith; and (5) Levin and Ferguson "signed off on a reprimand against [Smith] they knew to contain false allegations of misconduct."

Smith reasons the addition of these facts would show Levin and Ferguson are liable as participants in a conspiracy to harass Smith—a theory he has distilled from *Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 Cal.App.4th 1310 (*Weinbaum*). Alternately, he argues the additional facts show Levin and Ferguson are liable under the FEHA provision that makes it unlawful for "any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under [FEHA]." (Gov. Code, § 12940, subd. (i).)

The issue in *Weinbaum* was whether an employee discharged in violation of public policy could seek damages on a conspiracy theory from third parties who conspired with his employer to cause the employee's wrongful termination. The Court of Appeal

concluded no, because tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort; and a third party who was never the plaintiff's employer was not legally capable of committing the underlying tort, since the third party, unlike plaintiff's employer, did not owe a duty to plaintiff not to discharge him for refusing to participate in unlawful conduct. (*Weinbaum, supra,* 46 Cal.App.4th at pp. 1312–1313, 1315.) From this, Smith suggests he could state a claim against Levin and Ferguson for participating in a conspiracy to harass him, presumably because they, like the Agency, owe a duty under FEHA not to harass Agency employees.

Smith's amendments, however, are not sufficient to show that Levin and Ferguson participated in a conspiracy to harass him. The allegations in the second amended complaint stated only instances of adverse actions taken by Robles-Wong—there were no allegations of any conduct on the part of Levin or Ferguson amounting to harassment.[6] When one of several coconspirators has not actually committed the underlying wrongful act, or some part of it, it is necessary to allege that that coconspirator "acted under an agreement (conspiracy)" with the other coconspirators to commit the underlying wrongful act. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581; see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 921, p. 336.) There is nothing in the second amended complaint, nor in the additional facts proffered by Smith, demonstrating either Levin or Ferguson agreed with Robles-Wong to the plan that she would harass Smith because of his race.

Nor do the additional proffered facts, taken together with the allegations of the second amended complaint, show that either Levin or Ferguson are liable under FEHA because they aided or abetted Robles-Wong in the commission of the alleged adverse actions she took against Smith. (Gov. Code, § 12940, subd. (i).) A defendant's liability for "aiding and abetting" under this provision requires the defendant either "(a) knows the other's conduct constitutes a breach of duty and *gives substantial assistance or encouragement* to the other to so act, or (b) gives *substantial assistance* to the other in

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6 "[S]upervisory employees [are] at risk of personal liability for *personal* conduct constituting harassment." (*Janken, supra,* 46 Cal.App.4th at p. 62, italics added.)

accomplishing a tortuous result and the [defendant's] own conduct, separately considered, constitutes a breach of duty to the third person." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325–1326 (*Fiol*), italics added.) The additional facts fail to show either that Levin or Ferguson knowingly gave Robles-Wong "substantial assistance or encouragement" to engage in the alleged adverse actions she took against Smith. Mere inaction by a supervisor does not constitute aiding and abetting. (*Fiol, supra*, at pp. 1325, fn. 5, 1330–1331.) Mere knowledge that a tort is being committed, and the failure to prevent it, is likewise not aiding and abetting. (*Id.* at p. 1326.)

Finally, it is clear the additional facts do not show that Levin or Ferguson engaged in any act of inducement, offer of consideration, or other conduct designed to incite, compel, or coerce Robles-Wong into committing the alleged adverse actions she took against Smith. (Gov. Code, § 12940, subd. (i).)

"Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance, *if a fair prior opportunity to correct the substantive defect has not been given*." (*Larwin, supra,* 101 Cal.App.3d at p. 635, original italics.) Here, the trial court gave Smith an ample, fair opportunity to correct the substantive defect at issue here—the lack of any factual allegations of conduct by Levin or Ferguson amounting to harassment of Smith based on his race. The court put Smith on notice that his allegations failed to state any cause of action against Levin or Ferguson when it sustained the City's demurrer to his original complaint with leave to amend. The court granted leave to amend a second time, when it sustained the City's demurrer to his first amended complaint, and, as a practical matter, granted leave a *third* time, when it allowed Smith to submit a proffer of alleged conduct by Levin and Ferguson that would state a cause of action for harassment, before entering its final order ruling on the demurrer. Having been afforded a fair opportunity to cure the defect in his cause of action for harassment as to Levin and Ferguson, Smith was unable to do so. Accordingly, the trial court did not abuse its discretion in denying further leave. (*Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906, 918.)

DISPOSITION

Treating the order sustaining the demurrer as to Levin and Ferguson as a judgment of dismissal, we affirm.

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Marchiano, P.J.

We concur:

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Dondero, J.

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Banke, J.